(1)

84-1111

Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER, 1984 TERM

LEONARD SUSSMAN,
PETITIONER

v

THE NEWS JOURNAL CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALBERT S. C. MILLAR, JR.
Attorney for Petitioner
1239 King Street
Jacksonville, Florida 32204
Phone 904/388-5032

In the Supreme Court of the United States

LEONARD SUSSMAN,
PETITIONER

V

THE NEWS-JOURNAL CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Leonard Sussman, presents this, his Petition for a Writ of Certiorari and states:

I. The questions presented for review are:

(a) May an employer in commerce legally make unilateral changes in office rules delineating causes for discharge while a collective bargaining agreement is in effect?

(b) Does a plea of **nolo contendere** under Florida Criminal Law made after 12:01 A.M., July 1, 1977, of itself constitute an admission of guilt to the criminal offense to which the plea was made?

(c) Does the applicable state statute of limitations govern a straightforward suit under Section 301 of the Labor Management Relations Act, 29 USC Section 185 by an employee against an employer for breach of a collective bargaining agreement that did not involve any agreement to submit disputes to arbitration?

2. All parties to this proceeding are contained in the caption.

3. The table of authorities are as follows:

Florida Statute, Section 95.11 (3) (k) .....
28 United States Code, Section 1254 .....
29 United States Code, Section 185 .....
Federal Rules of Criminal Procedure
11(e) (6) (B) .....
Former Florida Rules of Criminal Procedure
3.170 (j) .....
Florida Rules of Criminal Procedure
3.172 (d) .....
Auto Workers v Hoosier Corp., 383 US
696 (1966) .....
DelCostello v United Steelworkers, 103 S.Ct.
2281, 76 L.Ed. 476 (1983) .....
Erkins v United Steelworkers, 723 F.2d. 837
(CA-11) (1984) .....
North Carolina v Alford, 400 US 25, 91 S.Ct.
160, 27 L.Ed. 162 (1970) .....
Steelworkers v Warrior and Gulf Navigation Co.
363 US 574 .....
The Florida Bar Re Florida Florida Rules of Criminal
Procedure (Fla.SC) (1977), 343 So. 2d. 1247 .....
Vaca v Sipes, 386 US 171 .....
Verhold v State, 376 So.2d. 1166 .....
Vinson v State, 345 So.2d. 711 .....
Williams v State, 316 So.2d. 267 (Fla) (1975) .....

4. Petitioner seeks to have reviewed a Final Judgment of the District Court for the Middle District of Florida granting Respondent's Motion for Summary Judgment which Judgment and Opinion are contained in Petitioner's Appendix pages 1 to 9 , the decision of the United States Court of Appeals for the Eleventh Circuit dated August 30, 1984 affirming the said Judgment appearing on page 11 of Petitioner's Appendix and the Order of the United States Court of Appeals for the Eleventh Circuit dated October 11, 1984, denying Petitioner's Petition for Rehearing **en banc** appearing on Page 12 of Petitioner's Appendix.

5. Petitioner relies on 28 United States Code, Section 1254 to confer jurisdiction upon this Honorable Court inasmuch as the Final Judgment, and the Decision of the United States Court of Appeals for the Eleventh Circuit interpret a provision of the law of the State of Florida contrary to a decision of the Florida Supreme Court (Court of last resort) and apply a statute of limitations to a straightforward breach of collective bargaining agreement action by an employee against an employer considerably shorter than the applicable state statute of limitations held to apply to such actions by a decision of this Court.

6. The statutes and rules which this case involves are:

Former Florida Rule of Criminal Procedure 3.170(j) in effect until July 1, 1977;

Rule 3.170

(j) Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

A complete record of the proceedings at which a defendant pleads shall be kept by the court.

Florida Rule of Criminal Procedure 3.172 (d) effective July 1, 1977 and thereafter;

Rule 3.172

(d) Before the trial judge accepts a guilty or nolo contendere plea, he must determine that the defendant either 1) acknowledges his guilt, or 2) acknowlwdges that he feels the plea to be in his best interest, while maintaining his innocence."

Florida Statute, Section 95.11 - Actions other than for recovery of real property shall be commenced as follows:

95.11

* * *

(3) WITHIN FOUR YEARS. -

* * *

(k) A legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts."

7. STATEMENT OF THE CASE. - The Petitioner was member of a union covered by a written collective bargaining agreement which expired March 31, 1979. This agreement contained by reference, a set of negotiated Office Rules governing causes for discharge. After an adverse arbitration award in a case involving another employee, Thompson, the Respondent unilaterally imposed a new set of Office Rules containing a new Rule 14 which, contrary to the Thompson arbitration award, made conviction or admission of a crime a basis for discharge.

During the period of negotiations for a renewal contract from April 1, 1979 until March 22, 1981, the parties maintained in effect all provisions of the earlier collective bargaining agreement excepting only the no strike provisions and the provisions providing for binding

arbitration of grievances, including discharges. It was during this period where there was no provision in the collective bargaining agreement for arbitration that Petitioner, while maintaining his innocence, plead **nolo contendere** to a criminal charge because he considered the plea to his best interest, and as a result, was placed on probation and adjudication of guilt was withheld. As a result of this plea, the Respondent discharged Petitioner on July 25, 1979 for alleged violation of Rule 14.

The Petitioner filed his Complaint in Circuit Court for Volusia County, Florida, on July 14, 1979 (within (2) years of the date of his discharge). The case was removed to the United States District Court for the Middle District of Florida upon Petition by Respondent under authority of 29 United States Code, Section 185, and after a series of pleadings, filed a four (4) count Second Amended Complaint: Counts I and II founded upon **Vaca v. Sipes** 386 US 171, breach of duty of fair Union representation and breach of contract; Count III, a straightforward breach of contract; and Count IV a breach of settlement agreement reinstating Petitioner in a former case under 29 United States Code, Section 185. Upon motion by Respondent, the United States District Court granted Summary Judgment as to all four (4) counts. Petitioner appealed and the United States Court of Appeals for the Eleventh Circuit affirmed.

8. ARGUMENT. - Focus in this Petition will be addressed to the Court's ruling below as to Count III of the Petitioner's Second Amended Complaint. This is plainly a straightforward breach of contract action by an employee against an employer under a collective bargaining agreement that did not provide for arbitration of disputes. Count III specifically deletes reallegation of paragraphs 11,

13, and 20 of his Second Amended Complaint dealing with allegations of lack of fair union representation (Petitioner's Appendix pages 15 and 16), to make it expressly clear that this was a straightforward 301 breach of contract action.

The first aspect of Count III is that Rule 14 was invalid because it was unilaterally imposed by the Respondent. Since the rule was invalid so was Petitioner's discharge for alleged violation of the Rule. Perforce, the promulgation of an additional ground of discharge is a change in working conditions and unilateral changes in wages, hours and working conditions contained in a collective bargaining agreement have long been held to be illegal.

Petitioner submits that the District Court below erroneously conluded that the Respondent could unilaterally adopt any Office Rules (causes for discharge) it desired as long as they did not violate the civil rights of an employee or rights under the international charter (Petitioner's Appendix, page 4).

Additionally in Count III, Petitioner alleged that even if the Rule were valid, he did not violate it because he was neither convicted of or admitted a criminal violation. There seems to be no dispute that Petitioner was not convicted of a criminal charge for indeed it is undisputed that adjudication of guilt was withheld. It is also undisputed that Petitioner has maintained his innocence at every stage of this and the earlier criminal proceeding and indeed so alleged in paragraph 24 of this Second Amended Complaint.

The District Court below however, erroneously construed Petitioner's plea of **nolo contendere** to be an admission of guilt even though this plea of convenience, while expressly maintaining innocence, was expressly permitted under the Florida Rules of Criminal Procedure

in effect at the time the Petitioner made his plea. In the case of **The Florida Bar Re Florida Rules of Criminal Procedure** (Fla SC) (1977) 343 So2d. 1247 the Florida Supreme Court adopted Criminal Rule 3.172(d) by the following language:

> " * * *
>
> The following amendments or additions to the Florida Rules of Criminal Procedure are hereby adopted and shall govern all proceedings within their scope after 12:01 a.m., July 1, 1977. These rules shall supersede all conflicting rules and statutes.
>
> * * *
>
> (d) Before the trial judge accepts a guilty or nolo contendere plea, he must determine that the defendant either 1) acknowledges his guilt, or 2) acknowledges that he feels the plea to be in his best interest, while maintaining his innocence.
>
> * * *
>
> Committee Note - New in Florida. In view of Supreme Court's emphasis on the importance of this procedure as set forth in **Williams v State**, 316 So.2d, 267 (Fla. 1975), Committee felt is appropriate to expand the language of former Rule 3.170(j) (deleted) and establish a separate rule. Incorporates Fed.R.Crim.P. 11(c), and allows for pleas of convenience as provided in **North Carolina v Alford**, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 162 (1970)."

This rule permitted pleas of convenience in Florida Criminal Courts for the first time and patterned Florida

Criminal Procedure as to pleas much like Federal Rule of Criminal Procedure 11, which expressly provides that pleas of **nolo contendere** may not be used against a person in a later criminal or civil proceeding. See Federal Rule of Criminal Procedure 11 (e) (6) (B).

In its opinion below the District Court stated "clearly there cannot be a genuine issue of fact as to the applicability of Rule 14 to Mr. Sussman under those circumstances." In effect the District Court found that a plea of **nolo contendere** was an admission of guilt under Florida Law even though the Rules of Criminal Procedure promulgated by the Florida Supreme Court provided otherwise. The case of **Vinson v State** 345 So. 2d 711 and **Verhold v State**, 376 So.2d 1166 also does not support his finding because **Vinson** was expressly construing former rule 3.170(j), as was **Vernold** simply citing **Vinson, supra.**

Petitioner submits that under Florida Law in effect at the time of his discharge the plea of **nolo contendere** should not have been even admissible at a trial in this cause but even if admissible, only to rebut Petitioner's uncontradicted maintenance of innocence, the truth of which would be for the jury as the trier of fact to decide.

Next, the Petitioner alleged and attached in Paragraph 7 of his Second Amended Complaint the arbitrator's award in the Thompson case reversing a discharge by Respondent for admitted conviction of a crime. Under the Steelworkers Trilogy, **Steelworkers v Warrior and Gulf Navigation Co.**, 363 US 574 this was part of the law of the shop and District Court below erred in stating that the Petitioner had to submit more evidence at this time (summary judgment) that this Rule was discriminatorily applied to him.

Finally, since this was a straightforward breach of contract count, the applicable statute of limitations was the Florida four (4) year breach of contract statute. Florida Statute, Section 95.11(3) (k). Such was the holding of this Honorable Court in **Auto Workers v Hoosier Corp**, 383 US 696 (1966) which was expressly excepted from this Honorable Court's holding in **DelCostello v United Steelworkers** 103 SCt. 2281, 76 L.Ed. 476(1983), and remains the law to date. See also **Erkins v United Steelwo-kers of America**, 723 F.2d. 837 (CA-11) (1984).

Respectfully submitted this 9th day of January, 1985.

ALBERT S. C. MILLAR, JR.
Counsel for Petitioner
1239 King Street
Jacksonville, Florida 32204

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing have been furnished David A. Monaco, Esquire, P.O. Box 191, Daytona Beach, Florida 32015, by mail this 9th day of January, 1985.

/s/ ALBERT S. C. MILLAR, JR.
Counsel for Petitioner

In the Supreme Court of the United States

LEONARD SUSSMAN,
PETITIONER

v.

THE NEWS-JOURNAL CORPORATION,
RESPONDENT

PETITIONER'S APPENDIX

A 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LEONARD SUSSMAN,
Plantiff,

vs.

THE NEWS-JOURNAL CORPORATION,
Defendent.

No. 81-429-Orl-Civ-R

ORDER AND
MEMORANDUM OF DECISION

From the plaintiff's **Second Amended Complaint** it appears that the plaintiff was discharged by the defendant on 25 July 1979. The plaintiff, as a Union member, had been covered by a collective bargaining agreement a copy of which is attached to the original complaint and incorporated in the **Second Amended Complaint** by reference. (§ 5, **Second Amended Complaint**). On 29 January 1979, the defendant allegedly unilaterally adopted new office rules without the consent of the Daytona Typographical Union Local 892. A copy of those rules is attached to the **Second Amended Complaint** as an exhibit. (§ 8, **Second Amended Complaint**). Local 892 allegedly disputed the adoption of the rules, but did not seek to arbitrate the employer's unilateral action.

The plaintiff was allegedly discharged for a violation of Rule 14. (§ 10, **Second Amended Complaint**).

Paragraph 12 of the **Second Amended Complaint** alleges that the terms of the collective bargaining agreement attached to the original complaint were orally extended to 1 June 1980. However, in the plaintiff's brief in opposition to the **Motion for Summary Judgment**, the plaintiff apparently takes a slightly modified position. There he states:

> Both the Company and the Union agree that at the time of discharge there was not in effect any arbitration procedure, but that all other terms of the written collective bargaining agreement were in effect until an impasse was reached and the Defendant unilaterally imposed it's (sic) conditions of employment June 1, 1980.

The present action was filed originally in the Florida Circuit Court for Volusia County, Florida "around" 14 July 1981. See plaintiff's brief in opposition to defendant's **Motion for Summary Judgment**, page 1. The action was thereafter removed. The claims are alleged to fall within this court's subject matter jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185,, (§ 1, **Second Amended Complaint**).

Count I of the **Second Amended Complaint** alleges that if the Union had attempted to arbitrate the change of office rules, the plaintiff could not have been subject to discharge. At the argument on the **Motion for Summary Judgment**, the plaintiff's attorney conceded that Count I, because it is based on a failure of the Union to adequately represent the plaintiff, is barred by the six month statute of limitations provided in 29 U.S.C. § 160 (b). See **DelCostello v. Teamsters**, 103 S.Ct. 2281, 76 L. Ed.2d. 476. Such concession is well taken, particularly in light of the

Eleventh Circuit ruling which recognized the inescapable conclusion that **DelCostello** is to be applied to causes of action accruing prior to the **DelCostello** opinion. See **Rogers v. Lockheed-Georgia Company,_____F.2d ____**(11th Cir. 1983).

Count II of the **Second Amended Complaint** alleges that the plaintiff's Union did not fairly represent the plaintiff in negotiating a collective bargaining agreement subsequent to the plaintiff's discharge. The plaintiff reasons that the collective bargaining agreement which was executed by the defendant and the Union on 22 March 1981 should have secured for him a right to arbitrate his 25 July 1979 discharge. The Union, according to the plaintiff, traded "his right" for a pay raise for the other union members. Whatever may be said for the merit of these allegations as a claim against the Union, they do not assert an actionable breach on the part of the employer. For that reason, the **Motion for Summary Judgment** will be granted with respect to Count II.

Under Count III of the **Second Amended Complaint** the plaintiff contends that his discharge was a violation of the collective bargaining agreement which was in effect from 1 April 1976 to 31 March 1979 (the agreement attached to the original complaint). The plaintiff's theory is that the collective bargaining agreement, with the exception of the arbitration and no strike provisions, continued in effect until after his discharge. The breach of the collective bargaining agreement, according to the plaintiff, was the unilateral adoption of the new office rules under which the plaintiff was discharged. Alternatively the plaintiff contends that he did not violate Rule 14 and his discharge was discriminatory because other persons similarly situated have not been discharged.

The plaintiff's first theory under Count III is inconsistent with the provisions of the collective bargaining agreement. Section 7.01 expressly recognizes that the defendant, subject to the provisions of the collective bargaining agreement, retains the exclusive right to manage its business. The only provision in the collective bargaining agreement specifically dealing with office rules is Section 19.01. That section allows for the discharge of an employee for a violation of "office rules". It provides that office rules shall not abridge the civil rights of employees or rights under the General International Typographical Union Laws. The agreement, therefore, permits the unilateral adoption by the employer of any office rules it desires which do not violate the civil rights of an employee or rights under the international charter. The **Second Amended Complaint** makes no allegation that the office rule in question violates either.

The undisputed evidence provided by the deposition of Mr. Sussman is that he pled nolo contendere to a charge of receiving stolen property, that he was fined $5,000.00, placed on probation for a period of five years, and was ordered to pay restitution in the amount of $500.00. Clearly there cannot be a genuine issue of fact as to the applicability of Rule 14 to Mr. Sussman under those circumstances. Receiving stolen property was a felony under the law of Florida at the time of Mr. Sussman's discharge. See Section 812.014, **Fla. Stat.** 1979. Under Florida law, a plea of nolo contendere admits the allegations in the accusatory pleading and authorizes the imposition of a sentence. **Vinson v. State**, 345 So.2d 711, 713 (Fla. 1977). See also **Vernold v. State,** 376 So.2d 1166 (Fla. 1979).

The plaintiff has alleged in Count III that Rule 14 was discriminatorily applied to him. Under the evidence

provided by plaintiff's admissions, the rule is shown to have been justifiably applied to the plaintiff. This showing places on plaintiff the burden of producing some evidence that a genuine issue of fact exists with respect to the fairness of the application of Rule 14 to him. **Turner v. Loc. U. No. 302, Intern. Broth. of Team.**, 604 F.2d 1219 (9th Cir. 1979). The only reference in plaintiff's deposition to other employees involved in law violations appears at page 33, line 7. There plaintiff indicates that another employee was in fact fired for a drug violation. Thus plaintiff has not met the burden of producing some evidentiary basis for a trial of the issues developed in Count III.

There is an alternative reason why summary judgment is appropriate as to Count III. **DelCostello** mandates the application of a six month statute of limitation to Section 301 actions by employees for violation of the collective bargaining agreement. It is quite true that **DelCostello** involved a Section 301 action wherein both the union and the employer were charged. The Court nevertheless recognized the separate nature of the claims and held the **same** statute applicable to employer and union alike. The Court said:

> . . . Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.

DelCostello, supra, at 488. The plaintiff argues that a state statute of limitations applicable to contract actions should apply. However, there is simply no logical reason to apply

a different statute of limitations to the employee's claim against an employer when plaintiff voluntarily elects to forego his unfair representation claim against the union.

In **DelCostello**, the Court declined to apply the rule of **Auto Workers v. Hoosier Corp.**, 383 U.S. 696 (1966) which held a state statute of limitation applied to a union's action against an employer. The **DelCostello** court stated with respect to **Auto Workers**:

> . . . We held that the suit was governed by Indiana's six-year limitations period for actions on unwritten contracts; we resisted the suggestion that we establish some uniform federal period. Although we recognized that "the subject matter of § 301 is 'peculiarly one that calls for uniform law,'" . . . we reasoned that national uniformity is of less importance when the case does not involve "**those consensual processes that federal labor law is chiefly designed to promote-the formation of the collective bargaining agreement and the private settlement of disputes under it,**" . . .

DelCostello, supra, at 487 (emphasis added). Count III of the **Second Amended Complaint** in the present action does involve a private dispute under the collective bargaining agreement. The alleged breaches by the employer are analogous to an employer unfair labor practice. Furthermore, Count III specifically alleges that the Union, by not seeking arbitration relating to Rule 14, breached a duty of fair representation owed the plaintiff (§s 9, 14 and 21, **Second Amended Complaint**). Although the plaintiff voluntarily dropped the Union from this

action, it is obvious from the allegations of the **Second Amended Complaint**, if they are taken as true, that plaintiff's injury arises not just from an employer's breach on contract. The injury is equally traceable to a Union's breach of its duty of fair representation. Hence for statute of limitations purposes, the plaintiff's claim cannot be fairly characterized as "a straightforward breach of contract suit under § 301, as was Hoosier". The National Labor Relations Act, § 160(b), provides, therefore, the most appropriate statute of limitation. For the foregoing reasons, the **Motion for Summary Judgment** will be granted with respect to Count III.

This court is aware of the opinion of the United States Court of Appeals for the Eleventh Circuit in **Erkins v. United Steelworkers of America**,_____F.2d_____, No. 82-7217, 23 January 1984. There the Eleventh Circuit held that the six month statute of limitations in the National Labor Relations Act applied to an unfair representation claim filed by union members against their union. In dictum the court suggested that a state statute of limitations would apply to an employee's suit against the employer for breach of a collective bargaining agreement. The dictum was based on the holding by the Supreme Court in **Auto Workers v. Hoosier Corp., supra**. **Auto Workers**, however, is significantly distinguishable from the present action. It was an action by a labor organization against an employer only partially based on a collective bargaining agreement. In no respect did it involve injury allegedly related to a union's breach of its duty to fairly represent employees. Further, as pointed out above, **Auto Workers** did not involve the private settlement of a dispute under a collective bargaining agreement. This court concludes that to apply any limitation statute other than that applied in **DelCostello** would be inconsistent with the policy of national uniformity adhered to in **DelCostello**.

Count IV of the **Second Amended Complaint** was added to this case in November 1983, after several years of litigation. Count IV read most generously for the plaintiff alleges a breach of a settlement agreement entered into between the plaintiff and the defendent The News-Journal Corporation in civil action no. 77-247. That action this court judicially knows was terminated on 31 October 1977 by the filing of a notice of dismissal **with prejudice** by the plaintiff. To the extent that Count IV alleges that **the discharge of the plaintiff** was in violation of the settlement agreement, the defendant is entitled to a summary judgment for the reasons mentioned in the first part of the foregoing discussion of Count III. To the extent, however, that the count alleges a right to recover damages for a violation of the specific provisions of the settlement agreement, this court concludes that it lacks jurisdiction.

The court recognizes, of course, that it has inherent jurisdiction to enforce a settlement agreement entered into by parties while litigation is pending. See **Massachusetts Casualty Insurance Company v. Forman**, 469 F.2d 259 (5th Cir. 1972), and **Lee v. Hunt**, 631 F.2d 1171 (5th Cir. 1980). The court, however, concludes that it lost such inherent jurisdiction upon the dismissal of the prior action with prejudice. The plaintiff does not question this proposition, but asserts that the court has jurisdiction to consider the claim under the provisions of Section 301 of the Labor Management Relations Act. Section 301 of the Labor Management Relations Act confers on the court jurisdiction to entertain actions based on the violation of an agreement between the employer and a labor organization. The stipulation for settlement attached to the **Second Amended Complaint** is not within the purview of Section 301. It was an agreement between an employer and a single employee - not a labor organization. This court concludes that it lacks subject matter jurisdiction

over the claim asserted in Count IV. If the settlement agreement could be construed to fall within the scope of Section 301, the claim under Count IV is barred by the statute of limitations for the reasons mentioned in the discussion of Count III.

The **Motion for Summary Judgment** is granted. The Clerk shall enter a judgment in favor of the defendant The News-Journal Corporation.

DONE AND ORDERED in Chambers at Orlando, Florida, this 23rd day of February, 1984.

Judge
John A. Reed, Jr.

JUDGMENT ON DECISION BY THE COURT
for the

United States District Court

MIDDLE DISTRICT OF FLORIDA - ORLANDO DIVISION

LEONARD SUSSMAN,
Plaintiff

v.

THE NEWS-JOURNAL CORPORATION,
Defendent.

CIVILACTION DOCKET NO. 81-429-Civ-Orl-11

JUDGMENT

This action came on for (hearing) before the court, United States District Judge John A. Reed, Jr. presiding. The issues having been duly (heard) and a decision having been duly rendered, it is ordered and adjudged that the plaintiff Leonard Sussman take nothing on his claim against the defendant The News-Journal Corporation, and the action be dismissed.

APPROVED FOR ENTRY:

_____
JUDGE

Dated at: Orlando, Florida
Date: February 23, 1984

DONALD M. CINNAMOND, Clerk
By: _____
Deputy Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIURCUIT

No. 84-3186
Non-Argument Calendar

LEONARD SUSSMAN,

Plaintiff-Appellant,

versus

NEWS-JOURNAL CORPORATION,

Defendent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(August 30, 1984)

Before FAY, VANCE AND KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiff appeals the district court's summary judgment in favor of his former employer in this wrongful discharge case. From our consideration of the record and the arguments presented in the briefs of the parties we conclude that the judgment of the district court should be affirmed.

AFFIRMED

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3186

LEONARD SUSSMAN,
Plaintiff-Appellant,

versus

THE NEWS-JOURNAL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion August 30, 1984, 11 Cir., 198 . F.2d).
(Oct. 11, 1984)
Before Fay, Vance, and Kravitch, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

SECOND AMENDED COMPLAINT

COUNT I

COMES NOW the Plaintiff herein and sues the Defendant, The New-Journal Corporation, alleging:

1. Jurisdiction of this action is invoked pursuant to Title 29 USC 185.

2. At all times pertinent hereto the Defendant was and is in the business of publishing newspapers in Daytona Beach, Florida.

3. Plaintiff was an employee of the Defendant at it's Daytona Beach newpaper.

4. At all times pertinent hereto, the Plaintiff was a member in good standing of Daytona Typographical Union, Local 892 (hereinafter called the Union).

5. From March 31, 1976, to March 31, 1979, the Defendant and the Union had a written collective bargaining agreement in effect covering all employees represented by the Union, including Plaintiff herein, a copy of which is attached to the original complaint, and is incorporated herein.

6. This said collective bargaining agreement, was negotiated with, and referred to a mutually agreed set of office rules in effect since June 4, 1974, a copy of which is attached hereto.

7. This set of office rules did not permit the Defendant to discharge an employee for commission of a criminal offense unrelated to his job as was interpreted and determined by an arbitrator in the arbitration of the discharge of Charles Thompson, another employee also a member of the Union, a copy of which award is attached hereto.

8. On or about January 29, 1979, during the term of the said Collective Bargaining Agreement, the Defendant unilaterally and without consulting the Union, imposed a new set of office rules (hereinafter called the disputed rules), adding a number of new causes for discharge, specifically, including commission of a criminal offense unrelated to an employees job, a copy of disputed rules is attached hereto. This unilateral action by Defendant was illegal and a breach of the said collective bargaining agreement.

9. The Union protested the disputed rules by letter grievance dated January 30, 1979, attached hereto, but the Defendant denied same and the Union did not take the matter to arbitration as was it's exclusive right and duty as the exclusive bargaining agent of its members and Defendant's employees.

10. The said collective bargaining agreement expired on March 31, 1979, and shortly thereafter, the Plaintiff was charged a criminal offense unrelated to his work and was discharged under the sole alleged authority of Disputed Rule 14.

11. The Union failed to fairly represent Plaintiff and members in that it did not take to arbitration, as was its

exclusive right, the unilateral action of the Defendant in the imposition of the disputed rules which materially affected the working conditions of Defendant's employees, including Plaintiff herein, in that these disputed rules gave away employees rights which had been bargained for over the years and which had been upheld by arbitration award.

12. All terms of the written collective bargaining agreement were by mutual agreement orally extended until June 1, 1980.

13. If the Union had fairly represented Plaintiff and had arbitrated the Defendant's breach of contract by unilaterally imposing the disputed rules, the Defendant could not have fired the Plaintiff under the terms of Section 19.01 of the contract because the only basis given for Plaintiff's discharge was the invalid rule.

14. As a result of the Defendant's breach of contract aforesaid, and the Union's refusal to fairly represent it's members, including Plaintiff herein, the Plaintiff was obliged to retain the undersigned and has agreed to pay him a reasonable fee.

15. The Defendant engaged on a continuing course of discrimination against the Plaintiff ever since the Defendant was required to reinstate Plaintiff as a result of the agreement dated October 20, 1977, in case number 77-247, in the United States District Court for the Middle District of Florida, and Plaintiff's discharge on July 25, 1979 was a culmination of that pattern of discrimination, and was intentional, wilful and malicious.

WHEREFORE, Plaintiff demands judgment against the Defendant for lost wages, benefits, attorney's fees,

punitive damages, and seeks reinstatement to his job without loss of benefits and demands a trial by jury.

COUNT II

COMES NOW the Plaintiff and sues the Defendant alleging:

16. Plaintiff realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 15 of Count I.

17. The Plaintiff was terminated on July 25, 1979, for alleged violation of Rule 14 of the disputed rules.

18. The Defendant and the Union met on numerous occasions between February, 1979, and March, 1981, to attempt to reach a complete written collective bargaining agreement to succeed the one that expired March 22, 1981, and finally executed a written collective bargaining agreement on March 22, 1981, a copy of which is attached hereto.

19. The primary or only reason the parties were unable to negotiate a successor contract for almost two years is that the company was demanding changes in the contract language (Section 10.8, March 22, 1981 contract) that would prevent Plaintiff from ever being able to arbitrate his discharge as per Company letter dated December 8, 1980, and Frank Hamilton's letter dated January 16, 1981, attached hereto.

20. The Union did not fairly represent Plaintiff in that Plaintiff's discharge was a breach of the collective bargaining agreement that expired March 31, 1979, and of the oral extension contract (19-01-collective bargaining agreement, March 31, 1979) that existed between April 1,

1979 and March 31, 1981, and by the execution of the March 22, 1981, collective bargaining agreement with Section 10.8 included therein, the Union essentially gave up and traded Plaintiff's right to arbitrate his discharge for the pay raise for other members contained in the March 22, 1981, collective bargaining agreement.

WHEREFORE, Plaintiff demands judgment against the Defendant for lost wages, benefits, attorney's fees, punitive damages, and seeks reinstatement to his job without loss of benefits and demands a trial by jury.

COUNT III

Comes Now the plaintiff and sues the Defendant alleging:

21. Plaintiff realleges each and every fact and allegation contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 17 hereof.

22. During the period April 1, 1979, to June 1, 1980, **the parties mutually agreed to extend and observe all terms of the collective bargaining agreement that expired March 31, 1979**, except the no strike clause (Section 11-01) and the arbitration clause (Section 12-05, 12-06, and 12-07). They specifically extended Section 19-01 which expressly gives the Plaintiff the right to challenge the fairness of his discharge.

23. The Union filed a grievance and demand for arbitration as to Plaintiff's discharge by letter dated August 30, 1979, copies of both are attached hereto.

24. The Plaintiff alleges that the Defendant breached it's

contract and that Plaintiff was unfairly discharged in that Rule 14 of the disputed rules was illegally promulgated and that, even if it were legal, the Plaintiff never committed, admitted or was convicted of a crime other than minor traffic violations.

25. Additionally and alternatively, the Plaintiff alleges that Rule 14 of the disputed rules was discriminatorily applied in that the Defendant did not discharge other employees convicted of a crime after the Defendant illegally promulgated the disputed rules.

WHEREFORE, Plaintiff demands judgment against the Defendant for lost wages and benefits, reinstatement to this former job without loss of pay or benefits and demands a trial by jury.

OFFICE RULES
Effective January 29, 1979

14.
Commission of any crime, other than minor traffic infractions, is prohibited. Conviction or admission of such a crime will constitute conclusive proof of the commission.